August 17, 1950
Op. No. 50-304

Headquarters Eighth Army
United States Army
Office of the Army Judge Advocate
Legal Assistance Branch
APO 343 c/o Postmaster
San Francisco, California

Attention: Richard E. O'Brien

Gentlemen:

This acknowledges receipt of your letter of August 8 which has just been received. You ask for the opinion of this office on the following questions:

> " * * * (1) whether or not common law marriages in Arizona are permitted as of this date? (2) if your answer to No. 1 is in the negative the period of time, if any, when same were recognized; (3) in the event common law marriages were ever recognized in Arizona, the prerequisites of same, i.e., cohabitation required, open and notorious holding out to the public, etc."

The answer to question No. 1 is "No".

For a marriage contracted in Arizona to be valid, it is necessary that the contracting parties obtain a license issued by the Clerk of the Superior Court of the county wherein one of the parties resides or in which the marriage is to take place, and a marriage ceremony must be performed and solemnized by a person authorized by law or presumably having such capacity and believed in good faith by at least one of the parties to have the same.

Section 63-103, ACA 1939, No marriage without license.

Section 63-111, ACA 1939, Ceremonial marriages only recognized.

The answer to question No. 2 is also "No", with the exception that prior to 1913 the law was:

> "All persons who at any time heretofore have lived together as husband and wife for the period of one year or more, and who shall continue to live together for the period of one year from and after the time this chapter takes effect, or until one of the parties shall die, if death occurs before the expiration of one year after this chapter takes effect, shall be considered as having been legally married and the children heretofore or hereafter born of such cohabitations are declared legitimate." (Section 3098, Revised Statutes Arizona, 1901, p. 810)

In 1913 the Legislature of Arizona abrogated the so-called common law marriage and enacted Section 3844, Revised Statutes, Arizona, 1913, Civil Code, which provides:

> "The common law rule that a marriage may be contracted by agreement of the parties without marriage ceremony is hereby abrogated and no marriage contracted within this state shall be valid unless a license be issued as provided in this chapter, and a marriage solemnized by one of the persons authorized by law, or by some one purporting to act in the capacity of a clergyman, judge or justice, and believed in good faith, by at least one of the parties, to be such."

The case of Levy v. Blakely, 41 Ariz. 327, 18 Pac. 2d 263, is historically enlightening:

> " * * * What is necessary to constitute a lawful marriage? Under the common law marriage was held to be a civil contract creating a certain status. The essentials of such contract were originally capacity and consent. It was necessary that there should be an actual and mutual agreement to enter into a matrimonial relation, permanent and exclusive of all others, between parties capable in law of making such a contract and consummated by their cohabitation as man and wife, or their mutual assumption openly of marital duties and obligations. 38 C.J. 1316. In addition thereto, in England the common law required a form of religious solemnization also, and the doctrine that marriages could be valid per verba de presenti or per verbe de futuro followed by cohabitation alone was expressly repudiated. Regina v. Mills, 8 Reprint 844, 17 E.R.C. 66; Beamish v. Beamish, 9 H.L. Cas. 274, 11 Reprint 735.
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> In the United States, however, the large majority of the states have recognized the contractual marriage made without any formal solemnization by an authorized person, and it is usually, though incorrectly, called 'common law' marriage. Kent. Com., vol. 2, sec. 26, p. 74; 38 C.J. 1315, and note. In some jurisdictions, however, this doctrine of contractual marriage without solemnization has always been rejected, and many other states which formerly accepted it have since specifically abolished it by statute. The courts of this state

have never been called upon to pass expressly upon this question. The matter is one for regulation by the legislature, and it is therefore to the statutes that we must turn to determine whether or not the contractual marriage ever existed in Arizona and, if so, whether and when it was abolished.

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In 1865 marriage was expressly declared a civil contract, and the state imposed no preliminary requirements on the persons entering into such contract, though it did recognize the fact that marriages were generally solemnized openly by some regular authority. There was no provision whatever for legitimizing offspring born outside of the marriage relation, whether such marriage was formal or merely contractual. The latter method of marriage was neither recognized nor repudiated, and, had there been no change in the statute, we might perhaps have assumed that the legislature accepted without question the usual rule of the American courts that contractual marriages were valid. In 1887, however, it was expressly provided that any person who desired to marry must apply for a license authorizing some one of the parties designated by statute to solemnize the marriage. The provision in regard to marriage constituting a civil contract was dropped and for the first time a method was provided for legitimizing children born outside of wedlock. * * *

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We think upon a careful consideration of our statutes from the establishment of the territory to the present time, that at an early date our legislature took the view that contractual marriages did not exist in Arizona, but, realizing the weaknesses of human nature, in 1887 and in 1901 adopted curative statutes

> declaring, as it had the power to do, that relationships previously entered into which had the qualities of contractual marriage should be recognized as constituting valid marriages, but declining expressly to extend recognition to such relations entered into after the passage of the particular curative statute, and that paragraph 3098, supra, instead of being a statute for the legitimization of children, was instead a statute for the recognition of certain statuses specified therein as being valid marriages ab initio, and that the legitimization of the children referred to was merely an incident to the legalization of marriage."

The answer to your question No. 3 is that if a marriage is valid in any state or country where contracted, it is recognized as valid in Arizona. Section 63-108, ACA 1939 provides:

> "Marriages contracted in another state.-- Marriages valid by the laws of the place where contracted, are valid in this state; provided, that marriages solemnized in any other state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state, and parties residing in this state can not evade its laws as to marriage by going into another state or country for the solemnization of the marriage ceremony."

In the case of Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105 at page 1107, the Supreme Court of Arizona held:

> "(2) Marriage is primarily a contract. In its constitution it is purely personal and consensual. Considered merely as a contract, it is valid everywhere if entered into according to the lex loci.

> This is the common-law rule. The statute recognizes the common-law rule. The statute recognizes the common-law rule, 'all marriages valid by the laws of the place where contracted shall be valid in this state.' * * * "

In Gradias v. Gradias, 51 Ariz. 35, 74 Pac. 2d 53, the Court said:

> " * * * It is the general rule of law that a marriage valid under the laws of the country where contracted will be recognized as valid everywhere. * * * The question of the validity of the marriage, therefore, depends upon the place where it is contracted, and not the place where an action for divorce is brought."

Since the recognized rule of law is as above stated, namely, that a marriage which is valid in the state or country where contracted, is valid in Arizona, the effect of the manner of contracting the marriage in such foreign country or state would seem to be of no import. That is, the elements necessary to constitute a valid common law marriage in a state or country where such is recognized might vary from the requirement of mere consent of the parties alone to their consent, coupled with cohabitation, presentation or holding out to the public as husband and wife.

You have not specifically asked the question posed in Section 63-108, supra. It is, however, germane to our discussion. That question relates to the validity of marriages contracted in other states by persons who are not eligible to remarry for a period of one year after divorce and who go into such other state for the specific purpose of marrying, intending at that time to return and reside in Arizona. The Supreme Court of Arizona in the case of Horton v. Horton, supra, has held that despite the prohibition mentioned in the statute, such marriages are nevertheless recognized as valid, the statute not in terms or by necessary implication declaring such marriage void. The Horton case holds that notwithstanding the provisions forbidding the

evasion of marriage laws by going into another state, since the legislature has not declared void the marriage of parties domiciled in Arizona who go into another state to evade the restrictions upon remarriage after divorce, such marriage is valid, if valid in the state where celebrated.

The case of King v. Klemp, a New Jersey case, 57 Atl. 2d 530, supports this view.

Please feel free to call upon us at any time you feel we may be of further service to you.

Sincerely yours,

FRED O. WILSON
Attorney General

PHIL J. MUNCH
Assistant Attorney General

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